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No. 98-208

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CAROLE KOLSTAD,

Petitioner,

v.

AMERICAN DENTAL ASSOCIATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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STATEMENT[1]

The Chamber of Commerce of the United States of America (the "Chamber"), a nonprofit corporation organized and existing under the laws of the District of Columbia, is the world's largest federation of business, trade and professional organizations in the United States. The Chamber represents the interests of over 160,000 corporations, partnerships and proprietorships, as well as several thousand state and local chambers of commerce and professional associations. The Chamber has members of every size, in every sector and in every region of the United States. The Chamber also regularly represents the interests of these members in cases addressing issues of concern to the American business community, and has participated as *amicus curiae* in numerous cases before this court, including, from this past Term, *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998), and *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998), and nearly every constitutional punitive damages case in recent years.

The proper interpretation and application of employment discrimination laws and the remedies for which they provide is of crucial importance to the businesses represented by the Chamber. Chamber members employ millions of workers protected by these laws. Many members have, with the encouragement and support of the Chamber, designed and implemented antidiscrimination policies and grievance procedures in order to prevent discrimination in the workplace. These policies and procedures are frequently adjusted in response to this Court's interpretation of those laws.

Before this Court, the petitioner Carole Kolstad argues that punitive damages should be available against employers any time

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[1] Counsel for both parties have consented to the filing of this brief, and the Chamber of Commerce has filed those consents with the Clerk of Court. No counsel for a party has authored this brief in whole or in part, and no person or entity, other than the Chamber of Commerce, or its members, has made a monetary contribution to this brief's preparation or submission.

that an employer either knew or reasonably should have known that intentional discrimination is probably unlawful. If adopted, this standard would subject employers to punitive damages virtually every time an employee engages in intentional discrimination against another, whether or not the common law standards for imposing punitive damages have been satisfied, and whether or not the employer is complicit in such wrongdoing. The Chamber believes that petitioner's interpretation is inconsistent with the common law standard incorporated in the statute. The court of appeals' interpretation, allowing punitive damages only for egregious misconduct, is consistent with the common law, and would encourage employers to adopt and enforce grievance procedures and antiharassment policies that educate employees on their obligations under federal law. Because of the importance of these matters to its members and to the nation as a whole, the Chamber has a vital interest in this case.

INTRODUCTION AND SUMMARY

Unfortunately the petitioner and her supporting *amici*, like the court below, virtually ignore what the Chamber believes are the central issues. These issues are three: (1) whether, in enacting Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a, Congress intended to alter the common law rules for awarding punitive damages; (2) whether those common law rules required proof of egregious misconduct or some other particularly culpable action; and (3) whether, under the common law, employers were automatically liable for punitive damages for the conduct of their employees.

In enacting Section 102, Congress used terminology from the common law. It authorized an award of "punitive damages" and provided that such an award would be permissible where an employer engaged in intentional discrimination "with malice or with reckless indifference," 42 U.S.C. § 1981a(b)(1), again using terminology well-known to the common law of punitive damages. *See, e.g., Smith v. Wade*, 461 U.S. 30, 51 (1983) (describing this as the common law standard). There is no suggestion in the statutory language or in the legislative history that Congress intended to

depart from the common law standard, nor even any argument in the opposing briefs (save a conclusory footnote in the Equal Employment Opportunity Commission's brief) that Congress intended to depart from the common law standard.

This Court in *Molzof v. United States*, 502 U.S. 301 (1992), specifically held that at common law punitive damages were designed as "punishment for egregious conduct." 502 U.S. at 305-06. That decision, which is all but ignored in the opposing briefs, is supported by numerous other authorities, including the Restatement of Torts, and other decisions of this Court. *See, e.g., Smith v. Wade*, 461 U.S. at 49, 54; Restatement (Second) of Torts § 908(1) (1979).

The use of a malice-or-recklessness standard also shows an intent to follow common law standards. As this Court has recognized, malice or reckless disregard is the general common law standard. *See Smith v. Wade*, 461 U.S. at 51. The parties appear to agree that proof of "malice" requires proof of an intent to inflict serious injury. As this Court's decision in *Smith v. Wade* makes clear, in the area of punitive damages, reckless indifference refers to a mental state that is morally equivalent to malice. *See* 461 U.S. at 40 n.10. Petitioner's own authorities acknowledge that in the tort context, recklessness refers to a disregard for the risk of harmful consequences, not mere potential illegality. *See, e.g.*, Restatement (Second) of Torts § 500, at 588; W. Page Keeton *et al.*, *Prosser & Keeton on the Law of Torts* § 34, at 213 (5th ed. 1984).

Finally, contrary to petitioner's implicit suggestion, the culpability of an employee engaging in egregious misconduct is not automatically imputed to the employer. At common law and under this Court's recent decisions in *Faragher v. City of Boca Raton*, 118 S. Ct. 2275, and *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257, compensatory damages were automatically awardable against an employer for an employee's intentional discrimination in most circumstances, subject to certain affirmative defenses. But a different situation prevailed with respect to punitive damages. At common law, in order to avoid punishing innocent parties, courts would not impute an employee's culpability and liability for

punitive damages to the employer unless the employer was somehow implicated in its employee's misconduct or the employee was a high level manager acting within the scope of employment. The policies of Title VII themselves suggest that punitive damages should not be assessed against an employer acting in good faith, as manifested by the employer's adoption and implementation of antidiscrimination policies.

ARGUMENT

Although punitive damages are a creature of the common law, neither petitioner nor any of the *amici* in support of petitioner discuss the common law background of Section 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a, at any length. However, as this Court has repeatedly stressed, when a statutory provision such as Section 102 employs common law terms, that provision must be read as incorporating common law principles absent clear statutory language or legislative history to the contrary. There is no such language or legislative history here, and petitioner's interpretation of the statute is completely inconsistent with the common law.

I. THE CIVIL RIGHTS ACT OF 1991 MUST BE INTERPRETED IN LIGHT OF THE COMMON LAW

A. The Background of the Civil Rights Act of 1991

In enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, Congress sought "to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex or national origin." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974) (citations omitted). The Act therefore makes it an "unlawful employment practice" to hire, fire, promote, compensate, or impose terms and conditions of employment "because of [an] individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e-2(a). By its terms, the Act only applies to employers who regularly employ fifteen or more individuals, *id.* § 2000e(b), and the lower courts have consistently held that individual employees are not personally liable for violations of Title VII. *See, e.g., Gary v. Long*,

59 F.3d 1391, 1399 (D.C. Cir. 1995).[2] Instead, employers are vicariously liable for compensatory damages for discriminatory conduct by their employees, subject to certain affirmative defenses. *See Faragher v. City of Boca Raton*, 118 S. Ct. 2275, 2292-93 (1998); *Burlington Indus., Inc. v. Ellerth*, 118 S. Ct. 2257, 2270 (1998).

In Title VII, Congress selected "[c]ooperation and voluntary compliance . . . as the preferred means for achieving" the statute's goal of eliminating discrimination in employment. *Alexander v. Gardner-Denver Co.*, 415 U.S. at 44. In providing remedies where voluntary compliance has failed, Congress initially did not adopt the common law model. Instead, it chose to model the remedies under Title VII on the National Labor Relations Act, 29 U.S.C. § 151 *et seq. See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419 & n.11 (1975). While Title VII, as originally enacted, permitted private suits upon exhaustion of administrative remedies, it only authorized equitable relief. Once a court found an unlawful employment practice, it was authorized to enjoin the practice and "order such affirmative action as may be appropriate, which may include . . . reinstatement or hiring employees, with or without back pay." 42 U.S.C. § 2000e-5(g); *see also* 29 U.S.C. § 160(c) (authorizing the National Labor Relations Board to provide similar remedies).

Although these equitable remedies were intended to "mak[e] persons whole for injuries suffered through past discrimination," *Albemarle Paper Co.*, 422 U.S. at 421, they were nonetheless "circumscribed," at least in comparison with the remedies traditionally available in common law suits. *United States v. Burke*, 504 U.S. 229, 240 (1992). For example, the equitable remedies authorized by Title VII did not permit Title VII plaintiffs to obtain relief for "traditional harms associated with personal injury, such as pain and suffering, emotional distress, harm to reputation, or other

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[2] *Accord Tomka v. Seiler Corp.*, 66 F.3d 1295, 1314 (2d Cir. 1995); *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir. 1994); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991) (per curiam).

consequential damages." *Id.* at 239. In addition, because the primary monetary remedy under Title VII was back pay, the statute did not permit victims of harassment and other discrimination to obtain significant compensatory relief unless they were subject to a concrete job action affecting their pay. *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S. 244, 252-44 (1994).[3] Punitive damages were not available. *Id.* Accordingly, in the Civil Rights Act of 1991, Congress enacted a "major expansion in the relief available to victims of employment discrimination." *Id.* at 255.

Section 102 of the Act extends to Title VII plaintiffs those remedies traditionally available at common law. Subsection (a) states that the complaining party in a Title VII action brought against an employer that "engaged in unlawful intentional discrimination" may "recover compensatory and punitive damages as allowed in subsection (b) of this section," in addition to any equitable relief previously authorized under Title VII. 42 U.S.C. § 1981a(a)(1); *see also id.* § 1981a(a)(2) (authorizing similar relief in disability discrimination cases). Subsection (b) discusses the availability of punitive damages:

> A complaining party may recover punitive damages under this section against a respondent (other than a government, governmental agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

Id. § 1981a(b)(1).

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[3] *See also Swanson v. Elmhurst Chrysler Plymouth, Inc.*, 882 F.2d 1235, 1240 (7th Cir. 1989) (damages unavailable to redress violations not leading to discharge); *Abrams v. Baylor College of Medicine*, 805 F.2d 528, 535 (5th Cir. 1986) (vacating relief for attorneys' fees).

B. The Punitive Damages Provision in Section 102 Must Be Interpreted in Light of the Common Law

In interpreting statutes such as Title VII, courts do not presume that Congress wrote on a blank slate. Statutes legislating upon topics governed by the common law are "read with a presumption favoring the retention of long-established and familiar principles." *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952); *see Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991).

Where, as here, Congress not only legislates upon a common law topic, but also uses common law terms, the inference is especially compelling. One of the cardinal rules of statutory interpretation is that "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice," it has done so intentionally. *Morissette v. United States*, 342 U.S. 246, 263 (1952). Accordingly, in the absence of clear direction to the contrary, use of a term of art "may be taken as satisfaction with widely accepted definitions, not as a departure from them." *Id.* It is therefore a "settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms." *United States v. Shabani*, 513 U.S. 10, 13 (1994) (citation omitted). In other words, the plain language of the statute requires reference to the common law.

This principle applies to the interpretation of Title VII. For example, just this past Term, this Court considered the extent to which employers are vicariously liable for compensatory damages for the discriminatory acts of their employees and "rel[ied] on the general common law of agency . . . to give meaning to these [statutory] terms." *See Ellerth*, 118 S. Ct. at 2265. The use of a common law term, the Court observed, was a congressional direction to "interpret Title VII based on agency principles." *Id.*; *see Faragher*, 118 S.Ct. at 2285.

II. SECTION 102 ADOPTED THE COMMON LAW STANDARD, WHICH PERMITTED PUNITIVE DAMAGES ONLY IN CASES OF EGREGIOUS MISCONDUCT

Congress has employed many different labels and concepts in imposing extracompensatory damages in federal statutes. It has provided for "liquidated damages," "civil penalt[ies]," "double damages" and "treble damages," just to name a few.[4] As a consequence, the decision to employ the term "punitive damages" in Section 102 is of obvious significance. Petitioner, however, completely ignores this term and its common law meaning. The use of the common law term "punitive damages," and the common law standards for punitive damages, fully justify the lower court's requirement of egregious misconduct.

A. The Use of the Term "Punitive Damages" Requires Reference to the Common Law

The principle requiring reference to the common law in statutory interpretation has been applied repeatedly in the punitive damages context. For example, in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), this Court considered whether municipalities are immune from punitive damages under 42 U.S.C. § 1983. Because municipal immunity from punitive damages was well established at common law, and nothing in either the text, legislative history, or purposes of Section 1983 suggested that Congress intended to depart from that rule, this Court concluded that Congress intended to incorporate that immunity into that provision. *See Fact Concerts*, 453 U.S. at 259-71; *see also Smith v. Wade*, 461 U.S. at 38-41, 51 (upholding award of punitive damages under Section 1983 based on common law standard). As

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[4] *See, e.g.*, Age Discrimination in Employment Act, 29 U.S.C. § 626(b) (liquidated damages); Health Insurance for the Aged Act, 42 U.S.C. § 1395y (double damages); Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, 1964 (treble damages); False Claims Act, 31 U.S.C. § 3729 (treble damages and civil penalties).

discussed below (*see infra* pp. 13-14), this Court has also specifically held that a statutory reference to "punitive damages" requires incorporation of the common law definition of such damages. *See Molzof*, 502 U.S. at 307 (relying upon *Morissette*, 342 U.S. 246). Thus, absent a clear statement to the contrary in either the text of the Act or its legislative history — which does not exist here (*see infra* pp. 15-17) — Section 102(b)'s reference to "punitive damages" must be interpreted as incorporating the common law principles relating to such damages.

B. At Common Law, Punitive Damages Were Available Only to Punish Egregious Misconduct

It is well-settled that at common law punitive damages were reserved for instances of egregious misconduct. The Restatement defines punitive damages as "damages . . . awarded against a person to punish him for his outrageous conduct," Restatement (Second) of Torts § 908(1) (1979), and observes that such damages "can be awarded only for conduct for which this remedy is appropriate — which is to say, conduct involving some element of outrage similar to that usually found in crime." *Id.* § 908, cmt. b. This requirement of outrageous misconduct reflects the common law of punitive damages.

In the first English case involving the doctrine, the Chief Justice of the King's Bench observed that punitive damages are "proof of the detestation of the jury to the action itself." *Wilkes v. Wood*, Lofft. 1, 18-19, Eng. Rep. 489, 498-99 (K.B. 1763); *see also Lake Shore & M.S. Ry. Co. v. Prentice*, 147 U.S. 101, 106-07 (1893) (describing *Wilkes* as the "most distinct suggestion of the doctrine of exemplary or punitive damages in England before the American Revolution"). Writing for this Court when it first considered punitive damages, Justice Story similarly observed that punitive damages are justified by "gross and wanton outrage" and "lawless misconduct." *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558 (1818); *see also Smith v. Wade*, 461 U.S. at 49, 54 (noting that punitive damages are awarded to punish "'outrageous conduct'") (quotation omitted). Subsequent commentators have agreed that punitive damages are reserved for instances of "highly serious

misconduct." 1 D. Dobbs, *Dobbs on the Law of Remedies* § 3.11(2), at 468.[5]

While state of mind was certainly a relevant factor in assessing punitive damages, at common law an intent to violate the law or to disregard the law alone was not sufficient to warrant the imposition of punitive damages. Egregious misconduct was also required. As one commentator has observed, "[c]onduct and state of mind are two different things." 1 Dobbs, *Dobbs on Remedies* § 3.11(2), at 468. Although in analyzing punitive damages claims, "the two are usually rolled up together in the discussions," and "attention is usually given mainly to the mental state," the presence of egregious misconduct nonetheless remains an indispensable aspect of any valid punitive damages claim. *Id.* In short, punitive damages are only awarded "when the defendant is guilty of both a bad state of mind and highly serious misconduct." *Id.*

While some torts require proof of egregious misconduct so that punitive damages are routinely available whenever compensatory damages are available (*see Smith v. Wade*, 461 U.S. at 53-54), the same is not true of other intentional torts. The necessity of separate proof of egregious misconduct is demonstrated in many common law fraud cases, which, while not reflecting the unanimous view of the common law courts, certainly represent the better view. Although one of the traditional elements of fraud is an intent to deceive, some courts have refused to award punitive damages in fraud cases lacking truly egregious misconduct. These courts draw a distinction between "ordinary fraud, for which punitive damages

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[5] *See also* W. Page Keeton *et al.*, *Prosser & Keeton on the Law of Torts* § 2, at 9-10 (5th ed. 1984) (requiring "circumstances of aggravation or outrage, such as spite or 'malice' . . . or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton") (footnotes omitted); 1 Linda L. Schlueter & Kenneth R. Redden, *Punitive Damages* § 2.1(B), at 25 (3d ed. 1995) (noting that punitive damages require "some kind of outrageous conduct"); C. McCormick, *Damages* § 77 (1935) (noting that punitive damages "serve to give outlet, in cases of outrageous conduct, to the indignation of the jurors").

do not lie," and "gross fraud" aimed at the public in general or accompanied by aggravating factors, for which punitive damages are available. *Byrnes v. Faulkner, Dawkins & Sullivan*, 550 F.2d 1303, 1314 (2d Cir. 1977) (applying New York law); *see also* 37 C.J.S. *Fraud* § 144, at 489 (1943) (noting that punitive damages will not be awarded in the ordinary action of deceit, but only in cases involving "some violation of duty springing from a relation of trust or confidence, or where the fraud is gross or the case presents other extraordinary or exceptional circumstances clearly indicating malice and willfulness"); *see also* 4 L. Sand *et al.*, *Modern Federal Jury Instructions* ¶ 77.01, at 77-30 (1996) ("[p]unitive damages are appropriate only for especially shocking and offensive misconduct").[6]

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[6] *See also Southern Building & Loan Ass'n v. Dinsmore*, 144 So. 21, 23 (Ala. 1932) ("[p]unitive damages are recoverable . . . where defendant is guilty of gross fraud"); *Holcomb v. Hoffschneider*, 297 N.W.2d 210, 214 (Iowa 1980) ("not every fraud case permits an exemplary damages award; circumstances of aggravation are present in the fraud cases allowing such damages"); *Logsdon v. Graham Ford Co.*, 376 N.E.2d 1333, 1335 (Ohio 1978) (per curiam)(permitting punitive damages "in a fraud action where there is gross or malicious fraud or something showing a very corrupt condition of affairs"); *Laughlin v. Hopkinson*, 126 N.E. 591, 595 (Ill. 1920) ("in ordinary cases a recovery of exemplary damages will not be allowed . . . but such damages may be allowed where the wrong involves some violation of duty springing from a relation of trust or confidence, or where the fraud is gross, or the case presents other extraordinary or exceptional circumstances clearly showing malice and willfulness"); *Long v. McAllister*, 118 A. 506, 508 (Pa. 1922) (citations omitted) (exemplary damages only recoverable where "circumstances of extreme aggravation appear"); *see generally* 37 Am.Jur.2d *Fraud & Deceit* § 347, at 465 (1968) ("It is held that there may be a recovery of exemplary damages where the fraud, aimed at the public generally, is gross and involves high moral culpability.").

The contrary cases appear to rest on the view that all fraud is necessarily egregious, rather than the view that egregiousness is not required. *See Goben v. Barry*, 676 P.2d 90, 98 (Kan. 1984) ("[p]unitive damages may be awarded in the trial court's discretion whenever there is proof of fraud"). Not surprisingly, these cases typically involve clearly egregious conduct.

For example, in *Holcomb v. Hoffschneider*, a real estate agent falsely represented that the property sold to the plaintiffs in that case contained 6.6 acres, when it actually contained only 4.6. *See* 297 N.W.2d 210, 211 (Iowa 1980). Although the agent clearly acted with a conscious, if not a reckless, indifference towards the rights of the plaintiffs, the Iowa Supreme Court nonetheless rejected the suggestion that punitive or exemplary damages were available. The court observed that "not every fraud case permits an exemplary damage award; circumstances of aggravation are present in the fraud cases allowing such damages." *Id.* at 214; *see also id.* (noting that "additional circumstances of aggravation are essential"). Because the plaintiff's case in *Holcomb* was "at best . . . of the 'ordinary' or 'simple' fraud variety, unaggravated by circumstances warranting punitive damages," the Iowa Supreme Court upheld the denial of punitive damages despite the real estate agent's clearly culpable mental state. *Id.* at 215.[7]

Court decisions in other tort area also have adopted a similar standard. For example, in bad faith tort actions, even though the defendant by definition acts intentionally, some courts have required something more egregious before permitting punitive damages. As one court explained, "before punitive damages are awardable the evidence must reflect something more than the reck-

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See, e.g., id. at 97 (noting the defendant's breach of fiduciary duty and ousting of his co-venturer).

[7] Similarly, in *Logsdon v. Graham Ford Company*, the Ohio Supreme Court found the conduct in question too pedestrian to warrant punitive damages. In *Logsdon*, the defendant sold a truck equipped with a garbage packer based upon representations that both the chassis and the packer were new. In fact, however, the garbage packer had been previously owned. *See* 376 N.E.2d at 1334. Although the court sustained the award of compensatory damages, it upheld the trial court's refusal to instruct on punitive damages. *See id.* at 1335-36. Recognizing that the defendant "knowingly concealed . . . a fact material to the transaction" with an intention to induce the plaintiff to rely upon this deceit, the Ohio Supreme Court nonetheless concluded that the "actions on the part of appellant's salesman did not evidence malicious, wanton or gross fraud." *Id.* at 1336.

less disregard that is needed to support the bad faith claim." *Farr v. TransAmerica Occidental Life Ins. Co.*, 699 P.2d 376, 383 (Ariz. Ct. App. 1984); *see also Best Place, Inc. v. Penn America Ins. Co.*, 920 P.2d 334, 348 (Haw. 1996) ("[P]unitive damages may not be awarded in a bad faith tort case unless the evidence reflects 'something more' than the conduct necessary to establish the tort.").[8]

This approach — requiring proof of egregious misconduct for punitive damages — was specifically adopted in *Molzof v. United States*, 502 U.S. 301(1992). There, this Court interpreted a statute that like Section 102 refers to "punitive damages." It concluded that the statute should be interpreted in accordance with the common law and that the common law required egregious misconduct. Although the Equal Employment Opportunity Commission cites *Molzof*, see EEOC Br. at 23 n.15, neither petitioner nor her *amici* discuss the holding of this centrally relevant authority. Not surprisingly, they also fail to offer any reason why Section 102 should not also be read to incorporate the common law's requirement of egregious misconduct.

In *Molzof*, this Court construed the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.* The FTCA provides that the United States shall generally be liable in the same manner as any private defendant "but shall not be liable . . . for punitive damages." 28 U.S.C. § 2674. The plaintiff in *Molzof*, despite the availability of free medical care from the Government, sought to recover future medical expenses as well as damages for loss of enjoyment based upon medical malpractice at a Veteran's Administration hospital. *See Molzof*, 502 U.S. at 303. The Government contended that these damages were barred by the punitive damages exclusion because they bore no relation to compensation. The plaintiff urged that the

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[8] *See also Nelson v. Jacobsen*, 669 P.2d 1207 (Utah 1983) (requiring more than the malice required to establish alienation of affections for punitive damages award); *but see, e.g., Weiss v. United Fire & Cas. Co.*, 541 N.W.2d 753, 765 (Wis. 1995); *Nassen v. National States Ins. Co.*, 494 N.W.2d 231, 238 (Iowa 1992).

exclusion should be construed only to cover damages intended to punish egregious misconduct. *See id.* at 305-06.

The Court understood the plaintiff to urge adoption of the common law definition of punitive damages, and agreed that the statute incorporated that definition:

> Petitioner argues that § 2674 must be interpreted so as to permit awards against the United States of those state-law damages which are intended by state law to act as compensation for injuries sustained as a result of the tort, and *to preclude awards of damages which are intended to act as punishment for egregious conduct. We understand petitioner to be suggesting that the Court define the term "punitive damages" by reference to traditional common law . . . . We agree* with petitioner's interpretation of the term "punitive damages," and conclude that the Government's reading of § 2674 is contrary to the statutory language.

Molzof, 502 U.S. at 305-06 (quotation and citations omitted) (emphasis added).

As the Court recognized, the term "punitive damages" is a "legal term of art that has a widely accepted common law meaning" and a "long pedigree in the law." *Id.*; *see also id.* at 311 (noting that "the concept of 'punitive damages' is deeply rooted in the common law"). Moreover, in direct contrast to the position adopted by petitioner in this case, the Court understood that "[t]he common law definition of 'punitive damages' focuses on the nature of the defendant's conduct." *Id.* at 307. The Court therefore invoked the principle that statutes using common law terms should be interpreted to incorporate their common law meanings, *see id.* (discussing *Morissette*), and finding no contrary direction overcoming that presumption, held that the FTCA's punitive damages exclusion incorporated the common law's requirement of egregious misconduct. *See id.* at 307-12. The decision in *Molzof* applies equally to the 1991 Civil Rights Act.

C. There is Nothing in the Statute Suggesting That Congress Did Not Intend to Incorporate the Common Law

Section 102 of the 1991 Civil Rights Act should similarly be interpreted as incorporating the common law requirement of egregious misconduct. That section clearly invokes the common law concept of punitive damages, mentioning the term not once, but four times.[9] There is no suggestion in the statute or the legislative history, much less the clear direction required to overcome the presumption, that a different standard should be applied.[10] Thus, as in *Molzof*, the reference to punitive damages in Section 102 must be interpreted as incorporating the common law's requirement of egregious misconduct.

Petitioner relies on this Court's decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), for the proposition that Section 102 does not require outrageous misconduct. *See* Pet. Br. at 29-30. *Hazen* is, however, clearly inapposite. Although this Court rejected a requirement of outrageous conduct in that case, *see id.* at 615-16, the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, does not use the term "punitive damages." Instead, the ADEA refers to "liquidated damages." 29 U.S.C. § 626(b). Furthermore, this Court has recognized that the ADEA's remedial provisions incorporate the "remedies and procedures of the [Fair Labor Standards Act]," *see Lorillard v. Pons*, 434 U.S. 575, 582 (1978), and not those of the common law. Section 102, by contrast,

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[9] *See* 42 U.S.C. § 1981a(a)(1) (authorizing recovery of "punitive damages"); *id.* § 1981a(a)(2) (same); *id.* § 1981a(b)(1) (stating when a complaining party may "recover punitive damages"); *id.* § 1981a(b)(3) (limiting "the amount of punitive damages awarded").

[10] The EEOC asserts that Congress' "articulation of the governing standard for punitive damages" is "a contrary indication signaling departure from the common law." EEOC Br. at 23 n.15 (quotation omitted). This assertion makes no sense. While Section 102(b) refers to a standard for awarding punitive damages, it is the *common law* standard. *See infra* pp.. 17-22.

incorporates common law remedies. *See supra* p. 7. Thus, petitioner's reliance upon *Hazen* is clearly misplaced.

Observing that Congress has used the term "punitive damages" in other statutes and that those statutes refer to a number of different mental states, petitioner asserts that the "existence of a culpable mental state is the sole criterion for the award of punitive damages" in all but one of these statutes. *See* Pet. Br. at 25-26 & nn. 29-36. In fact, however, none of the statutes cited by petitioner sheds light on the particular standard that Congress adopted in Section 102. A few of these statutes, including 18 U.S.C. § 2707, 42 U.S.C. § 14503, and 18 U.S.C. § 2724, were either enacted or amended in relevant part after 1991, and therefore are irrelevant to Congress' intent in passing the Civil Rights Act of 1991. Several of the statutes passed prior to the 1991 Act authorize punitive damages using variations on common law standards of culpability and therefore, contrary to petitioner's suggestion, do not indicate any intent to depart from the common law requirement of egregiousness.[11] While still others use language that may depart from this requirement of egregiousness,[12] those statutes would at most show that Congress knew how to depart from the common law when it wished to do so. Thus, the statutes cited by petitioner cast no doubt on Congress' intent to incorporate the common law into Section 102 of the 1991 Civil Rights Act.

Finally, adopting petitioner's interpretation would raise constitutional questions. As this Court has recognized, the egregiousness or reprehensibility of a defendant's conduct is "[p]erhaps the most important indicium of the reasonableness of a

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[11] *See, e.g.*, 11 U.S.C. § 363 (awarding punitive damages for "willful disregard"); 12 U.S.C. § 3417 ("willful or intentional" violations); 15 U.S.C. § 1681n ("willful" noncompliance); 26 U.S.C. § 7431 (willful or grossly negligent inspections or disclosures); 42 U.S.C. § 669a (willful or grossly negligent disclosure).

[12] *See, e.g.*, 15 U.S.C. § 78u (awarding punitive damages if violation is "willful, intentional, and without good faith"); 15 U.S.C. § 1116 (awarding punitive damages where "seizure was sought in bad faith").

punitive damages award." *BMW of North America v. Gore*, 517 U.S. 559, 575 (1996); *see also id.* at 575 n.23 ("The flagrancy of the misconduct is thought to be the primary consideration in determining the amount of punitive damages.") (quoting Owen, *A Punitive Damages Overview*, 39 Vill. L. Rev. 363, 387 (1994)). Indeed, conduct that is "sufficiently reprehensible to give rise to tort liability," does not always "establish the high degree of culpability that warrants a substantial punitive damages award." *Id.* Even with Section 102's cap on damages, if this crucial "guidepost" of reprehensibility (*id.* at 574) were lacking, punitive damages awarded under Title VII would frequently be subject to serious constitutional challenge. As statutes should not be interpreted to raise constitutional questions, *see, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), Section 102 should be interpreted to incorporate the traditional common law requirement of egregious misconduct.

III. SECTION 102'S USE OF THE TERMS "MALICE" AND "RECKLESS INDIFFERENCE" ALSO INCORPORATES THE COMMON LAW

Like the statutory use of the term "punitive damages," Section 102's use of the terms "malice" and "reckless indifference" also evidences an intent to incorporate the common law. The use of that terminology certainly does not suggest that Congress meant to depart from common law requirements.

A. Section 102's Use of the Phrase "Reckless Indifference" Must Be Interpreted to Refer to a Culpable Disregard of a High Risk of Injury to Others.

Petitioner's reading of Section 102 purports to rely upon the "literal" meaning of the phrase "reckless indifference" read in isolation. *See* Pet. Br. at 34. This Court has, however, rejected this "blue-pencil style" of statutory interpretation. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140 (1985) (citation omitted). As this Court has repeatedly stated, "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Statutes must instead

be read as a whole, *see id.*, which means at a minimum that statutory language must be read in light of the surrounding language. *See, e.g., United States v. Morton*, 467 U.S. 822, 828 (1984); *see generally Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (discussing the principle *noscitur a sociis*, "a word is known by the company it keeps"). As a consequence, Section 102's reference to "reckless indifference" must be read in light of that section's reference to "punitive damages" and the common law standards that the term connotes and incorporates into the statute.

In addition, the phrase "reckless indifference" must be read in light of its immediate statutory neighbor and alternative: the requirement of "malice." Even at common law, as used by courts, the term malice was a "versatile and ambiguous term, carrying a broad spectrum of meanings." *Smith v. Wade*, 461 U.S. at 39 & n.8. In tort law and in the punitive damages context, however, the range of its meanings was relatively limited. The dictionary definition of malice is an "intention or desire to harm another," *Webster's Third New Int'l Dictionary* 1367 (1986), and courts have often used malice in this sense in the punitive damages context. *See Smith v. Wade*, 461 U.S. at 39 n.8; *see also id.* at 60-64 & n.3 (Rehnquist, J., dissenting) (arguing that at common law malice was used exclusively in this sense).

More commonly in the punitive damages context, courts used malice to refer to intentional infliction of injury in circumstances where, "without 'deliberate mind' or 'formed design,' the offender had been so grossly and recklessly negligent, so wantonly indifferent to another's rights," that punishment was warranted. *Id.* at 39-40 n.8. As malice and reckless indifference are part of the same standard, reckless indifference is most naturally understood as a mental state short of intentional infliction of injury that constitutes a culpable awareness of the possibility of harmful consequences.

Given the "slipperiness" of common law terms, it should come as no surprise that in the punitive damages context, the mental states of malice and reckless indifference have often been treated as "equally culpable and deserving of punishment and deterrence." *Smith v. Wade*, 461 U.S. at 39, 43 n.10. At common law, Courts

have found that "reckless disregard of what may be the probable consequence of an act calculated to cause injury . . . is the equivalent of willful misconduct." *Lacey v. Louisville & N.R. Co.*, 152 F. 134, 136 (5th Cir. 1907); *see generally* 1 Dobbs, *Dobbs on Remedies* § 3.11(2), at 469-70.[13] Thus, reckless indifference clearly refers to a disregard for the risk of serious injurious consequences that is morally analogous to an intent to cause those consequences and therefore deserving of punishment. This intentional (or reckless) infliction of serious injury constitutes the egregious misconduct required by the common law.

B. Petitioner's Interpretation Cannot Be Reconciled with the Common Law

Ignoring the use of the term malice and the common law treatment of the malice-or-recklessness standard in the punitive damages context, petitioner asserts that "reckless indifference" under Section 102 should be interpreted to be nothing more than an unreasonable disregard for the potential illegality of one's conduct. *See* Pet. Br. at 14 (asserting that Section 102 authorizes punitive damages where a defendant "knew or should reasonably have realized that its conduct was probably unlawful"). Although petitioner spends pages and pages discussing how the term "reckless indifference" has been used in a number of constitutional and statutory contexts, *see id.* at 18-24, only a few of the cases cited there use recklessness in relation to potential illegality,[14] and none (besides *Smith v. Wade*)

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[13] *See also Cowen v. Winters*, 96 F. 929, 934-35 (6th Cir. 1899) ("The reckless indifference to the rights of others is equivalent to an intentional violation of them."); *Alabama G. S. Ry. Co. v. Hill*, 8 So. 90, 93 (Ala. 1890) (finding "such indifference to the probable consequences" of the defendant's conduct and the "safety of passengers . . . the equivalent of intentional wrong"); *Memphis & C. R. Co. v. Whitfield*, 44 Miss. 466, 494-95 (1871) (awarding punitive damages for "that reckless disregard . . . which is equally culpable").

[14] *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 120 (1985) (defining willful violation of the ADEA as one where "the employer knew or showed reckless disregard for the matter of whether its conduct was

focus on punitive damages.[15] These cases simply do not support petitioner's standard.

Indeed, many of the authorities cited by petitioner support the Chamber's interpretation. For example, *Black's Law Dictionary* defines recklessness as "'[t]he state of mind accompanying an act, which either pays no regard to its *probably and possibility injurious consequences*, or which, though foreseeing such consequences, persists in spite of such knowledge.'" Pet. Br. at 17 (quoting *Black's Law Dictionary* 1271) (emphasis added). Similarly, the Restatement defines recklessness as engaging in conduct that "'creates an unreasonable risk of physical harm to another.'" Pet. Br. at 25 n.28 (quoting Restatement (Second) of Torts § 500), and Prosser defines the "usual meaning" of reckless as the intentional performance of an act "'in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow.'" *Id.* at 14 n.19 (quoting W. Page Keeton, *Prosser & Keeton on the Law of Torts* § 34, at 213. Finally, two punitive damages jury instructions quoted by petitioner both define the relevant mental state in regard to harmful consequences, not potential

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prohibited by the ADEA") (citation omitted); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (applying *Thurston* standard to ADEA statute of limitations); *Hazen Paper Co. v. Biggins*, 507 U.S. at 614 (1993) (reaffirming *Thurston* standard of "willful" as "reckless disregard for the matter of whether its conduct was prohibited by the [statute]"); *Russo v. Trifari, Krussman & Fishel, Inc.*, 837 F.2d 40, 44 (2d Cir. 1988) (applying *Thurston* to ADEA statute of limitations).

[15] *See Sacramento v. Lewis*, 118 S. Ct. 1708, 1711 (1998) (substantive due process); *Farmer v. Brennan*, 511 U.S. 825, 836 (1994) (Eighth Amendment); *Hazen v. Paper Co. v. Biggins*, 507 U.S. at 613 (liquidated damages); *Wilson v. Seiter*, 501 U.S. 294, 296-98 (1991) (Eighth Amendment); *McLaughlin v. Richland Shoe Co.*, 486 U.S. at 133-34 (Fair Labor Standards Act); *Tison v. Arizona*, 481 U.S. 137, 156 (1987) (Eighth Amendment); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. at 120 (liquidated damages); *Herbert v. Lando*, 441 U.S. 153, 160 (First Amendment) (1979); *Estelle v. Gamble*, 429 U.S. 97, 105 (1976) (Eighth Amendment); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (First Amendment).

illegality. *See* Pet. Br. at 14 n.19 (citing 1 Schlueter & Redden, *Punitive Damages* § 5.6(B)(4), at 298, 301 (quotations omitted)).

Nor does this Court's decision in *Smith v. Wade* support petitioner's interpretation. As petitioner points out, the Court did state that punitive damages are available when a defendant's conduct "involves reckless or callous indifference to the federally protected rights of others." 461 U.S. at 56. It is clear, however, from the context that the Court did not mean to indicate that punitive damages were available based upon knowledge of potential unlawfulness alone. Rather, as noted above, the Court saw recklessness as part of a spectrum ranging from "actual ill will, spite, or intent to injure" to "recklessness and negligence." *Id.* at 40-41, 43 n.10. The Court also saw no difference between "'reckless indifference to the rights of others'" and the "'entire want of care which would raise the presumption of a conscious indifference to consequences.'" *Id.* at 42-43 (emphasis omitted). Thus, in referring to reckless indifference to the rights of others, the Court clearly understood a substantial risk of harm to be implicit in the term reckless indifference — which is not surprising given that the petitioner in *Smith* was accused of reckless indifference to the right of a prisoner to personal safety and freedom from cruel and unusual punishment. *See id.* at 32-33.

This Court's acknowledgment that punitive damages are automatically available for some torts also does not help petitioner. *See* Pet. Br. at 28 (citing *Smith v. Wade*, 461 U.S. at 53). Each of the torts that *Smith* recognized as doing so — malicious prosecution, intentional infliction of emotional distress, defamation of public officials or public figures, and defamation subject to a common law qualified immunity — involves both egregious misconduct as an element of the tort and an abnormally high risk of substantial harm to the victim.[16] Thus, the fact that these torts

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[16] *See, e.g.*, Restatement (Second) of Torts § 653(a) (malicious prosecution requires the initiation or procurement of a criminal proceeding "for a purpose other than that of bringing an offender to justice"); *id.* § 46(1) (intentional infliction of emotional distress requires "extreme and

automatically warrant punitive damages neither supports petitioner's interpretation of reckless indifference nor justifies ignoring the common law requirement of egregious misconduct.

Finally, contrary to petitioner's contention, our interpretation is confirmed by the language of the Restatement. Although Section 908 of the Restatement states that punitive damages may be imposed where a defendant acts with either "evil motive or . . . reckless indifference to the rights of others," Restatement (Second) of Torts § 908(2), the Restatement refers to Section 500 for an explanation of the meaning of reckless indifference, *see id.* cmt. b, and Section 500 defines recklessness as knowing or having reason to know "of facts which create a high degree of risk of physical harm to another." *See id.* § 500, cmt. a; *see also id.* (noting that reckless conduct "must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent"). As used in Section 102, reckless indifference clearly refers to a high risk of injury, not mere awareness of illegality.

IV. THIS COURT SHOULD LOOK TO THE COMMON LAW TO DETERMINE WHEN PUNITIVE DAMAGES ARE PROPER AGAINST AN EMPLOYER FOR THE ACTS OF AN EMPLOYEE

Just as petitioner and her *amici* largely ignore the common law requirement of egregious misconduct, they also fail to address the question of an employer's common law exposure to punitive damages based upon the conduct of its employees. This is, however, a critical issue. As discussed earlier, *see supra* pp. 4-5 & n.2, Title VII imposes liability upon employers, not individuals. Consequently, in most Title VII cases the availability of punitive damages will depend not only upon whether the challenged conduct

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outrageous conduct" that "intentionally or recklessly causes severe emotional distress"); *id.* §§ 580A, 600 (requiring knowledge of falsity or disregard for the truth of a statement to overcome constitutional protections and common law immunities).

warrants punitive damages, but also upon the propriety of imposing vicarious liability for punitive damages upon the employer.

This Court should incorporate common law agency principles in defining the standard for vicarious liability for punitive damages. Only last Term this Court "rel[ied] on the general common law of agency . . . to give meaning to th[e] terms" "employer" and "agent" as used in Title VII. *Ellerth*, 118 S. Ct. at 2265 (applying the Restatement (Second) of Agency) (quotation omitted). At common law, employers can be subject to broad vicarious compensatory damages liability for the conduct of their employees, even for conduct outside the scope of employment. *See* Restatement (Second) of Agency § 219(2)(d) (1958) (holding principals liable any time an agent is "aided in accomplishing the tort by the existence of the agency relation"). Thus, this Court held employers vicariously liable for compensatory damages for discriminatory conduct by supervisory employees. *See Faragher*, 118 S. Ct. at 2292-93; *Ellerth*, 118 S. Ct. at 2270.

By contrast, the general rule at common law is that there is no vicarious liability for punitive damages. Indeed, when this Court first addressed a claim of punitive damages in *The Amiable Nancy*, it refused to impose punitive damages on a vicarious liability theory. Writing for the Court, Justice Story found the sort of "gross and wanton outrage" that would justify punitive damages, but refused to impose punitive damages on the owners of a ship for misconduct committed by the officer and crew because the owners were "innocent of the demerit of this transaction." 16 U.S. (3 Wheat.) at 558-59. Accordingly, the common law rule is that a principal may not "be held liable for exemplary or punitive damages merely by reason of wanton, oppressive or malicious intent on the part of the agent." *Lake Shore*, 147 U.S. at 107. As even the dissent below seemed to recognize, *see Kolstad*, 139 F.3d at 974 (Tatel, J.), there should be at least some culpability on the part of the employer before punitive damages may be imposed for the conduct of its employees. *See, e.g.*, Restatement (Second) of Torts § 909, cmt. b (noting that it is "improper ordinarily to award punitive damages against one who himself is personally innocent and therefore liable only vicariously"); McCormick, *Damages* § 80,

at 282 (finding "little justification for punishing the master for willfulness or wantonness of which the agent is alone guilty").

The common law rule on vicarious liability for punitive damages has a number of permutations. Where a principal authorizes an agent's misconduct in advance or ratifies it after, the principal is subject to punitive damages for that misconduct. *See* Restatement (Second) of Agency § 217C(a) (authorizing punitive damages where "the principal authorized the doing and the manner of the act"); *id.* § 217C(d) (authorizing punitive damages where "the principal or managerial agent of the principal ratified or approved the act"). Courts have also imposed punitive damages upon principals that acted culpably in retaining a clearly unfit individual. *See id.* § 217C(b) (authorizing punitive damages where the "agent was unfit and the principal was reckless in employing him").

An employer may also be subject to punitive damages liability based upon the position and authority of an employee wrongdoer acting within the scope of employment. It is well settled, for example, that punitive damages are appropriate where a corporation acts "by its controlling officers" to further its interests because the actions of such officers are for all intents and purposes the actions of the employer. *Denver v. R. G. Ry. v. Harris*, 122 U.S. 597, 610 (1887). There is, however, some confusion among the lower courts as to the punitive damages liability of an employer based upon the actions of lower-level employees. Based upon the need for deterrence, a number of jurisdictions take the view that an employer is liable for punitive damages without regard to the position of the employee whenever tortious conduct is committed in the course of employment. *See Briner v. Hyslop*, 337 N.W.2d 858, 864, 865 (Iowa 1983) (noting that twenty states follow this rule); 2 J. Ghiardi *et al.*, *Punitive Damages: Law & Practice* § 24.07, at 24-19 & n.1 (1998).[17]

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[17] This approach has been the subject of significant criticism. *See, e.g.*, *Briner*, 337 N.W.2d at 865-67 (criticizing the rule as unnecessary and unfair); 2 J. Ghiardi *et al.*, *Punitive Damages* § 24.07, at 24-20 (noting that the cases adopting the rule contain "minimal analysis").

The traditional — and majority — position is stricter. This Court held almost one hundred years ago that employers may not be held liable for punitive damages based upon the conduct of a "subordinate agent or servant," that is, an ordinary low-level employee. *See Lake Shore*, 147 U.S. at 114. Following this position, a majority of courts have adopted the Restatement approach, which makes a principal liable for punitive damages if "the agent was employed in a managerial capacity and was acting in the scope of employment." Restatement (Second) of Agency § 217C(c); *see also Briner*, 337 N.W.2d at 863-64 (noting that twenty-two states follow either this rule or a more restrictive approach).

The Restatement explains the rationale for the majority approach:

> Although there has been no fault on the part of a corporation or other employer, if a person acting in a managerial capacity either does an outrageous act or approves of the act by a subordinate, the imposition of punitive damages upon the employer serves as a deterrent to the employment of unfit persons for important positions.

Restatement (Second) of Torts § 909, cmt. b. The Restatement gives an example: the "operations manager" with overall responsibility in "a corporation owning a series of retail stores." *Id.* § 909, illus. 3.

There is some dispute among the courts adopting this approach as to the exact level an employee must occupy to be considered managerial for purposes of punitive damages. Although courts agree that an employee must have "power to make independent decisions" to qualify as a manager,[18] courts are divided over how much power is necessary: While some require only that the

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[18] *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1263-64 (10th Cir. 1995); *see also Gardner v. Federated Dep't Stores*, 907 F.2d 1348, 1352 (2d Cir. 1990) (refusing to impute punitive damages liability based upon the conduct of an "intermediate functionary").

employee supervise other employees and exercise some independent discretion, *see, e.g., Prospectus Alpha Navigation Co. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379, 1387 (9th Cir. 1985), the better view requires some policy-making authority as well. *See, e.g., Gardner*, 907 F.2d at 1352; *see also Egan v. Mutual of Omaha Ins. Co.*, 620 P.2d 141, 148 (Cal. 1979) ("[T]he critical inquiry is the degree of discretion the employees possess in making decisions that will ultimately determine corporate policy.").

Whatever the precise standard for identifying managerial employees, one thing is clear: an employer is not liable for punitive damages based upon the conduct of even higher level managers if the managers are acting outside "the scope of employment." *See* Restatement (Second) of Agency § 217C(c) (requiring managers to act within the scope of their employment). This requirement will preclude the award of punitive damages in many cases because when an employee is "[a]cting purely from personal ill will," their actions are not within the scope of employment. *Ellerth*, 118 S.Ct. at 2266.[19] Thus, in cases where an employee acts out of race- or "gender-based animus or a desire to fulfill sexual urges," the employee will not be acting within the scope of employment. *Ellerth*, 118 S. Ct. at 2266-67 (quotation omitted).

An even stricter scope of employment standard is appropriate for punitive damages where a managerial employee engaging in intentional discrimination acts directly contrary to a clearly articulated and consistently enforced company policy. That employee should therefore also be viewed as acting outside the scope of employment for the purposes of punitive damages.[20]

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[19] *See also id.* at 2267 (noting that "[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment"); Restatement (Second) of Agency § 235, Illus. 2; F. Mechem, *Outlines of the Law of Agency* § 368, at 248 (P. Mechem 4th ed. 1952) (noting that an agent "conspicuously and unmistakably seeking a personal end" acts outside of the scope of employment).

[20] A less demanding standard, of course, would continue to apply for compensatory damages. As this Court noted last Term, "[t]he Restatement defines conduct, including an intentional tort, to be within the scope of employment when 'actuated, at least in part, by a purpose to serve the [employer],' even if it is forbidden by the employer." *Ellerth*, 118 S.Ct. at 2266 (quotation omitted).

Consequently, where even the conduct of managerial-level employees is at issue, employers who implement and operate antidiscrimination programs in good faith should not be subject to punitive damages vicariously.

The policies underlying Title VII strongly support this result. As this Court recognized last Term, "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms." *Ellerth*, 118 S.Ct. at 2270; *see also* H.R. Rep. No. 40(I), at 65, 102d Cong. 1st Sess. (1991) (noting that one of the purposes of the damages remedies in the Civil Rights Act of 1991 is to "provid[e] employers with additional incentives to *prevent* intentional discrimination in the workplace before it happens"). Interpreting Title VII in the context of punitive damages to "give credit here to employers who make reasonable efforts to discharge their duty" furthers these basic policies of "encouraging forethought by employers and saving action by objecting employees." *Faragher*, 118 S. Ct. at 2292. Indeed, "a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive." *Id.* Thus, even if the common law did not afford protection, Title VII's policy of encouraging conciliation and voluntary compliance would require protection from punitive damages for employers who have complied with the statutory policies. *See id.* at 2292-93; *Ellerth*, 118 S. Ct. at 2270. Simply put, employers who are not culpable and have taken affirmative steps to prevent and punish discrimination should not be subject to punitive damages liability.

V. THE COURT SHOULD ARTICULATE THE RELEVANT FACTORS

As the preceding discussion suggests, the common law background against which Section 102 was enacted dictates a two-part process for the evaluation of punitive damages claims.

First, the Court must determine whether the conduct in question warrants punitive damages. As discussed above, this inquiry has a dual aspect: the actor must have intentionally or recklessly engaged in egregious misconduct. In making this inquiry, the Court should look to a number of factors:

• Intent to Violate or Reckless Disregard of the Law — Although not sufficient in and of itself to justify the imposition of punitive damages, an intent to violate or reckless disregard of the law is necessary. *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

• Serious Injury — In order for conduct to be egregious, the harm involved must be serious. It is not, however, necessary that such injury be actually inflicted. Punitive damages can and should be imposed where serious injury has been threatened but not realized. *See, e.g., TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460-62 (1993) ("[t]aking account of the potential harm that might result from the defendant's conduct").

• Repeated Misconduct — Even where the actual or threatened injury in a particular case is not serious taken alone, if the individual has engaged in repeated acts that in the aggregate threatened serious injury, that conduct may be deemed egregious. *See, e.g., BMW*, 517 U.S. at 576-77. As this Court has recognized, "repeated misconduct is more reprehensible than an individual instance of malfeasance." *Id.* at 577. In the context of Title VII suits against an employer, this principle applies whether the conduct in question involved repeated actions taken by several employees against an individual or repeated acts of one employee against a number of others.

• Scope of Harm — Courts should also consider whether the conduct in question affects a single person or a class of individuals.

Second, where punitive damages are claimed against an employer because of the acts of an employee, the court must determine when the employer should be held responsible for the employee's conduct. In unusual cases where the discrimination results from the employer's own action (for example, a policy requiring discrimination by employees) the employer will be directly implicated in, and responsible for, the conduct in question. In the majority of situations, where that is not the case, the question will be whether the employer should be held vicariously responsible for the conduct of its employees. The considerations relevant to this determination are generally those set forth in Section 217C of the Restatement (Second) of Agency. *See also* Restatement (Second) of Agency § 217C cmt. a (noting that Section 908 of the Restatement (Second) of Torts sets forth the same criteria). As noted above, punitive damages should only be awarded against an employer for the acts of an employee where (i) the employer authorized the doing and the manner of the offending act; (ii) the employee was unfit and the employer was reckless in employing or retaining him; (iii) the employee was a high level managerial employee and was acting in the scope of employment and not acting contrary to clearly articulated and consistently enforced company policy; or (iv) the employer ratified or approved the offending act.

CONCLUSION

For the foregoing reasons, this Court should adopt the punitive damages standard articulated by the Court below, with the modifications suggested herein.

Respectfully submitted,

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